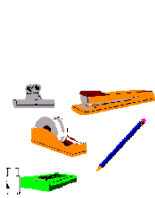


# **PURCHASING SUPPLIES, EQUIPMENT, AND SERVICES UNDER EPA GRANTS TO TRIBES AND TRIBAL CONSORTIUM**



## **CHAPTER 1 – GRANT RECIPIENT PURCHASING REQUIREMENTS**

As a recipient of EPA grants and cooperative agreements, you will likely need to buy supplies, equipment, and services to complete your project. This guidance will help you meet EPA requirements when making such necessary purchases.

The Uniform Administrative Requirements for Grants and Cooperative Agreements (40 CFR Part 31) applies to EPA grants and cooperative agreements to Tribal governments and Tribal Consortium. (From now on, the term “grants” will be used to refer to both types of assistance agreements.)

Most of this guidance is devoted to the acquisition procedures § 31.36 prescribes for Indian tribes. The rule requires that when Tribes and Tribal Consortium acquire property and services with grant funds, they must follow the same policies and procedures they use when making purchases with non-Federal funds. In addition, Tribes and Tribal Consortium must include in every grant-supported purchase order or contract all clauses required by Federal statute and executive orders.

EPA often calls purchasing under grants “**procurement**”, but in this guidance we use the term “**purchasing**”.

**This guidance does not apply to obtaining the services of individual consultants.** A consultant is a person who has expertise in a particular field (specialized skills) and who serves solely in an advisory capacity and is paid at a daily or hourly rate. A consultant primarily provides views or opinions on problems or questions you present. The term includes experts or persons with excellent qualifications and a high degree of attainment in a professional, scientific, technical, or other field. If you obtain the services of a contractor and the terms of the contract provide you with the responsibility for the selection, direction, and control of the individuals who will be providing services under the contract at an hourly or daily rate of compensation the

identified individual is likely a consultant. EPA has limits on its participation in payments for consultants, so if you have questions as to whether a particular individual is a consultant, you should contact your project officer or grants specialist for assistance.

**This guidance also does not apply to subgrants.** A subgrant is an award of financial assistance in the form of money, or property in lieu of money, which you make to an eligible subrecipient. The term “subgrant” does not encompass recipient purchases. EPA has other guidance applicable to subgrants. Contact your project officer or grants specialist for that guidance. (You cannot make a subgrant to a profit-making organization.)

## BASIC REQUIREMENTS FOR PURCHASING SYSTEMS



It is unlikely you will purchase the supplies, equipment, and services you need for your grant at an auction, but EPA’s purchasing guidance and requirements are designed to ensure that what you buy you get at a reasonable price in a fair and openly competitive way. Many EPA grant recipients have their own purchasing requirements and systems. If you have your own system and it meets the minimum standards of the EPA regulations as explained in this guidance, you may use that system. If your system does not comply, you may modify your system or make adjustments as needed so that your grant-supported purchases are made **in accordance with the minimum EPA requirements**.

The following sections of this guidance are based on and provide cross-references to the applicable regulations and can help ensure you have a strong purchasing system which will ensure you make sound purchasing decisions.

## RESPONSIBILITY



**You are responsible for the settlement and satisfaction of all contractual and administrative issues** arising out of contracts under your grant. Your purchasing system should establish procedures you will follow if disputes, claims, protests of award, source evaluation or other matters of a contractual nature arise. EPA will not substitute its judgment for yours unless the matter is primarily a Federal concern. You must refer violations of law to the Federal, State or local authority with jurisdiction (31.36(b)(11) and (12)). If you receive a bid protest, you must also notify EPA (40 CFR 31.36(b)(12)).

**You must ensure you do not purchase unnecessary things under your grant.**

**You must evaluate whether it is most economical to lease rather than purchase equipment and supplies.** (40 CFR 31.36(b)(4)). Equipment is tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. You may use your own definition of equipment provided that such definition would at least include all equipment defined above.

**Also, EPA may disallow the costs** of some activities or purchases you make under the grant, even though the activities and purchases were identified in your application. If, at any time, EPA finds that an activity or purchase is not necessary or does not comply with EPA regulations, EPA may disallow the cost. For example, if your approved grant application indicated you would be using the services of a contractor, but EPA later determines you did not obtain the contractor's services in accordance with EPA's minimum standards, EPA may disallow the cost.

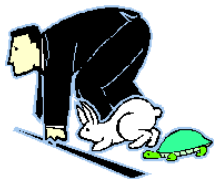
## CODE OF CONDUCT



**You must have written standards of conduct** which apply to employees involved in the award and administration of contracts for supplies, equipment, and services. (40 CFR 31.36(b)(3)). The code must ensure that:

- X Your employee, officer or agent (employee) does not participate in the selection, award, or administration of a contract under an EPA grant if the employee, any of the employee's family members or partners, or an organization which employs or is about to employ any of these persons, has a financial or other interest in the organization selected for the contract. This would be an inappropriate conflict of interest;
- X Your employee does not solicit or accept gratuities, favors, or anything of monetary value from your contractors. You may, however, set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value; and
- X If any of your employees violate the code, the code must make them subject to disciplinary action.

## COMPETITION



**You must, to the extent possible, provide full and open competition** in your purchasing (40 CFR 31.36(c)(1)). Some situations that are indicators of unnecessarily restricted competition include:

- X Imposing unreasonable requirements on firms in order for them to compete for your business;
- X Requiring unnecessary experience and excessive bonding;
- X Allowing noncompetitive pricing practices between firms or between affiliated companies;
- X Making noncompetitive awards to consultants that are on retainer contracts;

- X Permitting organizational conflicts of interest;
- X Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance of other relevant requirements of the procurement; and
- X Taking any arbitrary action during the purchasing process.

## **COST AND PRICE REVIEW**



**Your purchasing system must ensure the cost or price of your supplies, equipment, and services is reasonable** (40 CFR 31.36(f)). You do this by conducting a cost or price analysis for each procurement action. These analyses must be documented in your files:

- X Price analysis includes the comparison of price quotations submitted, market prices, bid prices for firm fixed price contracts or similar information; and
- X Cost analysis is the review and evaluation of each element of cost to determine reasonableness.

You must determine the method and depth of the review based on the facts surrounding your particular situation. As a starting point, you must make independent estimates of expected prices or costs before receiving bids or proposals. **Appendix A** to this guidance explains the type of reviews you must do in various situations.

## **DISADVANTAGED BUSINESS OPPORTUNITY**



**Under the Indian Self-Determination and Education Assistance Act, (ISDEAA) Section 7 (b) (2), any award of a grant (Indian or otherwise) for the benefit of the Tribes must first use positive efforts to use Native-Owned businesses.**

**You must also make positive efforts to use disadvantaged businesses,** including small businesses, minority-owned firms, women's business enterprises, and firms in labor surplus areas, whenever possible (40 CFR 31.36(e)). Actions you must take to accomplish this include:

- X Ensuring that small businesses, minority-owned firms, and women's business enterprises are used to the fullest extent practicable by including them on solicitation lists;
- X Assuring that small businesses, minority-owned firms, and women's business enterprises are solicited whenever they are potential sources;

- X Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small businesses, minority-owned firms, and women's business enterprises;
- X Establishing delivery schedules, where this is possible based on the timing of the need for the work, which encourage participation by small businesses, minority-owned firms, and women's business enterprises;
- X Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and
- X Requiring the prime contractor, if subcontracts are to be let, to take the same step as those listed above.

## DEBARMENT AND SUSPENSION



**You must ensure you do not award a contract to any person (organization or individual) debarred or suspended** or otherwise excluded from or ineligible for participation in Federal assistance programs (40 CFR 31.35). You must also ensure your contractor does not award a subcontract to any person debarred or suspended or otherwise excluded from or ineligible for participation in Federal assistance programs.

You can find the list of debarred, suspended, and excluded persons at:

[www.epls.gov](http://www.epls.gov).

When searching this site, search by the name of the contractor, not by agency, to ensure all debarred, suspended or otherwise excluded contractors are found. Some debarred contractors are ineligible under only certain programs. You must check the cause and treatment code to determine the circumstances related to each contractor. It may be necessary to contact the agency which imposed the suspension, debarment or exclusion to determine the effect of the action.

## RECORDS



**You must maintain records** that detail the history of each purchase (40CFR 31.36(b)(9)). These records must include the rationale for the method of procurement, the reason you selected the contract type, your justification for lack of competition when competitive bids or offers are not obtained, the reasons for contractor selection or rejection, and the basis for the contract price, including documentation of required price and cost analyses (**Appendix A**).

## CONTRACT PROVISIONS



**You must ensure your contracts are sound and complete** under all applicable laws, (Federal, state and tribal). Your contracts must also reflect the provisions listed in **Appendix B**. If your standard contracts meet the requirements of **Appendix B**, the clauses need not be repeated.

If you suspect or you receive reports that a contractor violated the EPA required contract provisions you must report those violations to your EPA project officer.

If EPA awards you a grant involving construction contracts in excess of \$2000, the Federal statute for the program under which the grant is awarded may require compliance with the Davis-Bacon Act. The Davis-Bacon Act requires contractors to pay wages to laborers and mechanics at least equal to minimum wages specified in wage determinations made by the Secretary of Labor. In such cases you must require your contractors to pay wages to laborers and mechanics at least equal to minimum wages specified in a wage determination made by the Secretary of Labor, you must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation, and you must condition your award of a contract on the acceptance of the wage determination. You must report all suspected or reported violations of Davis-Bacon Act requirements to the EPA project officer.

## CONTRACT TYPES



**You must decide which contract type is appropriate** given the circumstances of each purchase. You may use your standard contract types for contracts under your EPA grant. Contract types include:

- X **Fixed price contracts.** Fixed price contracts are used when there is a complete product description or specifications. The contractor must furnish the goods or services for the fixed price, and so assumes significant risk. Profit is not stated or negotiated separately. A fixed price contract generally is not appropriate if the work involves significant technical or engineering unknowns. Purchase orders and credit-card purchases, typically

used for low-dollar transactions, are examples of fixed-price contracts.

- X **Cost reimbursement contracts.** You should use a cost reimbursement contract only when it is not feasible to award a fixed price contract. The contractor's cost and fees must be separately stated in the contract. Cost reimbursement contracts can be riskier because you must pay the contractor's reasonable costs fees even if the project is not successfully completed before the contract expires. To minimize the risk of unacceptable cost growth, you may be able to negotiate contractual ceilings on the total cost and/or on indirect costs.
- X **Cost Plus Type Contracts Prohibited.** Percentage of construction cost and cost plus a percentage-of- cost contracts provide an incentive for the contractor to increase costs in order to increase profit. These contract types must not be used.

## CONSTRUCTION CONTRACT BONDS



**You must ensure EPA's interest in construction or facility improvement contracts under grants is adequately protected.** Construction bid and bond requirements are listed in **Appendix C**.

## CHAPTER 2 – GRANT RECIPIENT PURCHASING METHODS

**You must determine the purchasing method (examples below) and contract type that best fits your needs and circumstances.**

### SMALL PURCHASE METHOD



Small purchase is a relatively simple and informal method for purchasing supplies, equipment, and services that do not cost more than \$100,000. (40 CFR 1.36(d)). (Your council may have lower small purchase limits in its procedures. If so, follow those limits.)

Generally, you should review catalogs or obtain price quotes from three or four vendors who can meet your needs. You should select the lowest priced item or service which meets your requirements. You must, of course ensure:

- X The employee selecting the offer does not have a conflict of interest with any of the organizations contacted;
- X You make it possible for and encourage disadvantaged businesses to provide offers, to the extent possible, remembering Indian preferences under the ISDEAA;
- X The offer is not from a debarred or suspended person;
- X If you selected other than the lowest priced supply, equipment, or service, keep a written record explaining why; and
- X You keep files of the purchase, including the list of vendors contacted and the prices of each.

You do not need to obtain bid or performance bonds for small purchases.

### SEALED BID OR FORMALLY ADVERTISED PURCHASING METHOD



**For purchases with an estimated price of more than \$100,000, the sealed bid purchasing method is generally preferable** to other methods if the successful bid can be determined based mostly on price. Under this method, you must advertise for firm-fixed-price proposals or bids from capable vendors. The bids are opened at a previously announced time and place, and may be attended by any member of the public (including the bidders). The contract (lump sum or unit price) must be awarded to the responsible bidder whose bid conforms to the terms and conditions of the solicitation and is the lowest in price.

**Sealed bidding is feasible if:**

- X You have a complete, adequate, and realistic specification or purchase description;
- X It is likely there are two or more responsible bidders willing and able to compete for the contract; and
- X The purchase will result in a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

**If you use the sealed bidding method, you must:**

- X **Publicly advertise an invitation for bids** allowing potential bidders sufficient time to prepare bids before the public bid opening. The advertisement must make clear that any or all bids may be rejected if there is a sound documented reason. The advertisement must contain;
  - S A clear, accurate description of the technical requirements for the supplies, equipment or service to be purchased'
  - S Requirements which the bidder must meet and all other factors you will use to evaluate bids,
  - S A description, whenever practicable, of technical requirements in terms of functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards, and
  - S The specific features of "brand name or equal" descriptions that bidders are required to meet when such items are included in the solicitation.
- X **Take steps to involve disadvantaged businesses** (see section on Disadvantaged Business Utilization in Chapter 1), including sending known firms the advertisement requesting bids.
- X **Include specifications** and attachments which define the item or supplies, equipment, or service to be purchased in the advertisement. If the specifications are voluminous, they may be referenced, along with an instruction specifying when and where they may be examined, copied, or purchased.
- X **Publicly open bids** at the time and place announced in the advertisement.
- X **Select the responsible bidder whose bid is the lowest priced responsive bid;**

- S Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs may be considered in determining which bid price is the lowest,
- S If you decide to award the contract to other than the lowest-price bid, notify the EPA project officer to allow for the project officer's EPA review, if requested. (See Section on EPA pre-purchase review below.), and
- S **Before awarding a contract, ensure the selected bidder is not debarred, suspended, or otherwise excluded.** (See the Debarment and Suspension section in Chapter 1 for instructions on determining whether a bidder is debarred or suspended.) If the selected bidder is debarred or suspended, reject that bidder's bid and select the next best bidder, if the price is reasonable.
- X **Include in the signed contract the appropriate contract provisions** (See **Appendix B**).
- X **If the contract is for construction work, require the contractor to provide appropriate bid, performance, and payment bonds** when the contract is signed. (See **Appendix C**).

If you award a fixed-price contract award to the lowest-priced bidder who competed against at least one other bidder, no further price or cost review is required.

## COMPETITIVE PROPOSAL PURCHASING METHOD



**When it is not appropriate to use the sealed bidding method (i.e., the award cannot be made based primarily on price) for purchases exceeding \$100,000, the next most preferred method is generally called the competitive proposal method.** Under this method, you will evaluate factors such as the offeror's capability, the likelihood that the offeror's proposed management and technical approaches will meet your needs, the qualifications of the offeror's proposed project staff, the availability of necessary resources, the offeror's past performance record, and whether the offeror's proposed cost or price is reasonable. This method can be used for either a fixed price or a cost reimbursement type contract.

If you use the competitive proposal method, you must:

- X **Publicly advertise your request for proposals (RFP)** identifying the nature of supplies, equipment, or services needed, the evaluation factors and their relative importance, a preference;
- X **Take steps to involve disadvantaged businesses** (see section on Disadvantaged Business Utilization in Chapter 1), including sending known firms the advertisement requesting offers;

- X **Develop a system for conducting technical and cost/price evaluations** of the proposals to select the successful offeror;
- X **Use the evaluation system and the RFP criteria to select the responsible firm whose proposal is most advantageous**, recording the selection decision in a document which summarizes the results of the evaluation of all timely proposals and explains why the selected proposal is most advantageous;
- X **Include the appropriate contract provisions in the signed contract.**  
(See **Appendix B.**);
- X **If the contract is for construction work, require the contractor to provide appropriate bid, performance, and payment bonds** when the contract is signed; and.
- X **If offerors are required to submit the elements of their proposed cost, you must conduct a cost analysis to determine whether their proposed costs are reasonable.** Offerors must set forth their proposed fees or profit separately. (See **Appendix A.**)

**To obtain architectural/engineering (A/E) professional services**, you may use a qualifications-based form of the competitive proposal method. This method allows you to select the most qualified competitor based on the technical evaluation, subject to negotiation of fair and reasonable compensation. If you cannot reach agreement on price with that A/E firm, you can open price negotiations with the next most qualified firm. Before awarding the contract, you must conduct a cost analysis and include it in the procurement/contract file. (See **Appendix A.**)

#### **NON-COMPETITIVE OR SOLE SOURCE PURCHASING METHOD.**



**The noncompetitive purchasing method is authorized whenever one of the following occurs:**

- X You determine the item or service is available from only one source;
- X You determine public exigency or emergency will not permit a delay resulting from competition;

- X      You request and obtain EPA approval to use the noncompetitive proposal method for some other reason; or
- X      Only one bidder or offeror responds to a solicitation issued to several sources.

**You must conduct a cost analysis of noncompetitive proposals. (See Appendix A.)**

**You must notify the EPA project officer before using the non-competitive proposal purchasing method.** The project officer will likely instruct you to submit the proposed contract, and related information, including cost information provided by the bidder and your justification for the non-competitive method, for EPA review.

## CHAPTER 3 – EPA REVIEW OF GRANT RECIPIENT PURCHASES

EPA and other Federal agency staff may review your purchasing activities before or after award. EPA's approval of your grant does not mean that the allowability of the costs of the proposed activities and purchases identified in your application will never be questioned. If, at any time, EPA finds that an activity or purchase was not necessary or did not comply with EPA regulations, EPA may disallow the cost (40 CFR 31.43(a)(2)). For example, if your grant application indicated you would be using the services of a contractor, but you obtain the contractor's services in a way that does not comply with EPA's minimum standards, EPA may disallow the entire contract cost.

### EPA PRE-PURCHASE REVIEW



**You must give the EPA project officer the opportunity to review information related to your purchases before you sign contracts if (40 CFR 31.36(g)(1) and (2):**

- X Your purchasing procedures or operation fail to comply with the standards in EPA regulations;
- X Your purchase is expected to exceed \$100,000 and is to be awarded without competition or you receive only one bid or offer which exceeds \$100,000 in response to a solicitation;
- X Your purchase exceeds \$100,000 and specifies a "brand name" product;
- X Your proposed contract exceeds \$100,000 and is to be awarded to other than the apparent low bidder under a sealed bid procurement; and
- X You propose a contract modification which changes the scope of your contract or increases the contract amount by more than the \$100,000.

**You must contact your EPA project officer** for guidance as soon as you are aware of any of these situations.

**If you are a new recipient of an EPA award or if you have had purchasing problems** under previous EPA grants or reviews, EPA's project officer or grants specialist may review your procurement system before approving an award. EPA will contact you in such cases.

### EPA POST-PURCHASE REVIEW



**EPA may also review your purchases after they are made.** EPA staff may review your management systems for compliance with EPA requirements. We may conduct a desk review, in which case we will review any information we have in our files, find on the internet, or request and receive from you. This may include information related to particular purchases. We may also conduct a review at your location (on-site review). The reviewers will evaluate much the same information as under a desk review. EPA staff will contact you to arrange on-site reviews so they are as convenient as possible for you. Our review will evaluate your compliance with EPA requirements, including Disadvantaged Business Utilization, contract clauses, record keeping, cost and price review, as well as your purchasing methods.

### **SINGLE AND EPA AUDIT**



**If you spend \$300,000 (\$500,000 for fiscal years ending after December 31, 2003) or more in a year in Federal (not just EPA) grant funds, you must obtain a single or program-specific audit** in accordance with the requirements of OMB Circular A-133. You can find the Circular at:

<http://www.whitehouse.gov/omb/circulars/a133/a133.html>

If you receive only one federal grant and elect to do a program specific audit, it is likely your auditor will review your purchasing practices under EPA's grant. If you elect to have you auditor conduct a single audit, the auditor may review your EPA grant purchases. <http://www.whitehouse.gov/omb/circulars/a133/a133.html>

Also, EPA's Office of Inspector General or the General Accounting Office (GAO) may conduct an audit of your EPA grants. EPA and GAO auditors are likely to review your purchasing system as well as your purchases. These audits will be planned and performed in such a way as to build upon work performed by your auditors.

## **APPENDIX A**

## CONDUCTING PRICE AND COST ANALYSES



EPA regulations require you to conduct a price or cost review for each purchase and for each contract modification you make to support you grant (40 CFR 31.36(f)).

### PRICE ANALYSIS

A “**price analysis**” is an evaluation of a proposed price, without regard to the contractor's separate cost elements and proposed profit, to determine the price is reasonable. Before completing a purchase, you must conduct a price analysis for each small purchase (\$100,000 or less) and for each fixed price contract. The following guide will assist you in completing required price reviews.

**Cost Estimate** – Develop an independent cost estimate for the supplies, equipment, or service you will be purchasing. This estimate may be based on such things as you and your staff’s experience with similar purchases, a review of catalog or off-the-shelf prices, or other relevant information. Typically, the persons who develop the detailed plans and specifications for a fixed price contract will develop a detailed price estimate.

**Comparison of Prices** – Compare prices obtained from catalogs, suppliers, or bidders to your independent estimate.

#### **Price Reasonableness** –

- A. If the offeror or bidder’s price appears reasonable based on your independent estimate and other appropriate information, purchase the supply, equipment, or service.
- B. If the offeror or bidder’s price is significantly higher than your independent estimate, review your requirements to determine whether unnecessary, overly restrictive, or complex requirements caused the higher than expected price. (Even if the price is significantly lower than expected, you should review the stated requirement or plans and specifications to ensure they are complete and will result in the supply, equipment, or service you need.) If legally permissible, it may help, in making your determination, to talk to those providing quotes or bids; otherwise, you should consider cancelling the solicitation, make any necessary revisions/corrections, and resoliciting offers or bids. You may wish to consult your attorney to determine if such discussions are allowed.

### COST ANALYSIS

A “**cost analysis**” is the evaluation of each major contract cost category to determine reasonableness of each category and of the total cost of a contract or change order. You must perform a cost analysis if you require offerors to specify the elements (*e.g.*, personnel, fringe

benefits, travel, subcontracting, indirect costs, profit) of their proposed total contract cost. A cost analysis is also necessary whenever competition is lacking, and for sole source procurements, contract modifications, and change orders.

To obtain the information you need to conduct a cost analysis, you must instruct offerors to provide cost data with their offers. EPA does not prescribe a form for this cost data, so unless you have a standard form, offerors may submit their cost data in any appropriate format. If legally authorized, you should require offerors to certify that the cost information they submit is complete, current, and accurate. You should consult your attorney to determine if you can require a certification.

The following is a general list of cost categories under which contractors will submit cost information, and guidance on how you should evaluate each category:

**Personnel Costs** – Costs for labor directly related to the contract.

**For Example** the offeror will likely provide information that looks like this :

Category	Estimated Hours		Hourly Rate		
Professional	300	x	\$30.00	=	\$ 9,000
Nonprofessional	2000	x	25.00	=	50,000
Clerical	800	x	15.00	=	12,000
<b>Total Direct Personnel Cost</b>					<b>\$71,000</b>

**Consider:**

- A. Whether the level of effort or the total amount of time proposed is consistent with the effort required to complete the contract.
- B. The labor mix or the labor categories proposed to ensure they are consistent with the difficulty and technical nature of the work - professional versus nonprofessional versus clerical.
- C. The proposed salaries, including reasonable escalation factors to ensure they are consistent with the offerors' actual pay scales. Generally, the conversion of annual salaries into hourly rates is accomplished by dividing the annual salary by 2,087 hours (assuming an 8 hour work day).

**Fringe Benefits** – Personnel costs other than employees' direct salary or pay (i.e., employer's portion of FICA insurance, retirement, sick leave, holiday pay, and vacation cost. While these costs are normally accumulated in a pool and allocated using percentages as shown below,

offerors may calculate actual fringe benefit costs for each employee who will work on your job. Either method is acceptable if applied consistently.

**Example:**

Category	Estimated Fringe Benefit Rate		Total Hourly Pay		Fringe Benefit Amount
Professional	10%	x	\$9,000	=	\$ 900
Nonprofessional	10%	x	50,000	=	5,000
Clerical	10%	x	12,000	=	1,200
<b>Total Fringe Benefit Cost</b>					<b>\$7,100</b>

**Consider:**

A. Whether the fringe benefit rate applied to the direct labor base corresponds to fringe benefits available to each of the proposed labor categories and are consistent with the offeror's established benefits package.

B. Whether the offeror's FICA and unemployment insurance are applied only up to the maximum salary limits established by statute, if any.

**Indirect Costs** – Indirect costs are costs which cannot be charged to a project specific activity. Indirect costs often include office space, equipment depreciation, and personnel costs for clerical pools, executive salaries, and administrative support. Each organization determines the costs it will include in its indirect cost pool, and the organization must treat the costs the same in all cases. Indirect costs are allocated to the particular contracts based on a fair method of approximation, generally a percentage of a specific set of direct costs under the contract. Indirect costs are also referred to as overhead or burden costs.

Indirect costs should be logically grouped and compared to some part or all of the organization's direct costs (the base). The most popular base is direct labor; however, there are instances where an equitable allocation cannot be made using this base.

**Example:**

Category	Rate	x	Direct Labor Base	=	Cost
Indirect Cost	50%		\$71,000		\$35,000

<b>Total Indirect Cost</b>		<b>\$35,000</b>
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**Consider:**

- A. Whether the allocation base is an equitable basis for distribution.
- B. Confirm that the proposed overhead rate is the same the offeror uses in other contracts.

**Travel and per Diem Costs** – Travel costs include transportation, per diem or subsistence, and other reasonable travel costs directly related to the contract.

**Example:**

<b>Transportation</b>	<b>Number of Miles</b>		<b>Rate per Mile</b>		<b>Amount</b>
Private Vehicle–Office to job site and return	50	x	\$ .30	=	\$15.00
Private Vehicle–Office to EPA and return	20	x	.30	=	\$6.00
<b>Transportation</b>	<b>Origin</b>		<b>Dest</b>		
Flight to attend contract related meeting	Dallas		Waco		\$210.00
<b>Per Diem</b>	<b>Number of Days</b>		<b>Rate per Day</b>		
	10	x	\$75.00	=	\$750.00
<b>Total Travel and Per Diem Cost</b>					<b>\$991.00</b>

**Consider:**

- A. Whether the proposed travel is necessary.
- B. Whether all people traveling on a trip are necessary.
- C. The cost per trip is reasonable.
- D. Whether the per diem or subsistence allowance is the same for other travel by the offeror's personnel.

**Supply, Material and Equipment Costs** – Offerors will often have costs for supplies, material, and equipment (tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit), material, and supplies directly related to the contract.

**Example:**

Item	Quantity		Cost per Item		Cost
Recording Barometers	5	x	\$ 455	=	\$ 2,275
Wind Turbine Generator	1	x	6,370	=	6,370
Incremental Water Quality Samplers	5	x	1,600	=	8,000
Aluminum Tubing	1500 ft.	x	.70 ft.	=	1,050
Miscellaneous Supplies					2,105
<b>Total Equipment, Materials, Supply Cost</b>					<b>\$19,800</b>

**Consider:**

- A. Whether the proposed equipment is needed to complete the contract Equipment is tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit. You may use your own definition of equipment provided that such definition would at least include all equipment defined above.)
- B. Whether leasing or renting the equipment would be less costly than purchasing it.
- C. Whether the proposed materials and supplies are needed, and the estimated costs appear reasonable.

**Subcontract Costs** – Subcontracts are contracts awarded by your contractor.

**Example:**

	Cost				
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<b>Total Subcontract Costs</b> (Should be broken down among categories if subcontract exceeds \$100,000.)	\$100,000				
<b>Profit</b>	10,000				
<b>Total Cost</b>					\$110,000

**Consider:**

A. If the contractor awards subcontracts based on a firm-fixed price, you will only have the lump sum bid amount for the subcontractor. Assure the bid is reasonable based on estimates or catalogs or other information you have available.

B. If the subcontractor provides cost data, you must conduct a cost review of those subcontracts in excess of \$100,000 in the same manner as for prime contracts.

C. For subcontracts of \$100,000 or less, you may conduct an abbreviated review, evaluating only the cost and profit of each subcontract. (Profit for offerors and subcontractors should be evaluated based on the profit section below.)

**Profit** – Profit is the amount paid to a contractor above the total cost of the contract.

You should ensure that cost-reimbursement contractors get paid a profit which is fair and reasonable. Although there are no hard and fast rules for reviewing proposed fees or profits, you should consider such things as complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of the contractor's record of past performance, and industry profit rates in the surrounding geographical area for similar work..

**Example:**

	<b>Price</b>				
<b>Total Direct &amp; Indirect Costs</b>	\$100,000				
<b>Fees</b>	10,000				
<b>Total Cost</b>					\$110,000

### **Consider:**

- A. The offeror's risk. Generally, the greater the risk the contractor assumes, the higher the rate of profit. Contractors assume greater risks on fixed-price contracts involving complex or difficult tasks as opposed to cost reimbursement contracts.
- B. Fees may also be higher if the contractor incurs significant capital costs, exercises considerable ingenuity, or does independent developmental work.
- C. Percentage of construction cost and cost plus a percentage cost contracts provide an incentive for the contractor to increase costs in order to increase profit. These contract types must not be used.

### **Cost Analysis Findings**

After you complete a cost analysis, you must determine whether the proposed contract cost is reasonable. If the individual items are reasonable, the total cost is reasonable. You should award the contract.

- A. If you find an individual cost is not reasonable, you should discuss the cost with the contractor. If, based on the contractor's justification, you and the contractor reach agreement that the cost is reasonable, accept the cost. If you and the contractor agree the cost is excessive, negotiate a reduction to a reasonable amount and accept the cost.
- B. If you cannot agree with the contractor concerning the reasonableness of proposed costs, reject that contractor's offer. If the next highest ranked offer meets your requirements, you should review proposed cost information for that contractor. Follow the same review and negotiation process as above for the new contractor's proposed costs.

### **Documentation**

Document all actions in conducting each price or cost analysis. Ensure all price and cost analyses are described and retained in your records in accordance with your record retention requirements or EPA's.

## APPENDIX B

### CONTRACT PROVISIONS



You must ensure your contracts are sound and complete under applicable state and local law. Your contracts must also reflect the provisions required by federal law and EPA regulations which are listed below (40 CFR 31.36(i)). To the extent these requirements are met by provisions in your standard contracts, they need not be repeated.

1. **Remedies** – Contracts must include administrative, contractual, and legal remedies for use in cases in which contractors violate or breach contract terms. The contract must also make clear the remedial actions which you may take.

2. **Termination** – Contracts in excess of \$10,000 must explain the conditions under which you may terminate them for cause or for your convenience, including the process for bringing about the termination and the basis for settlement.

3. **Equal Employment Opportunity** – Construction contracts in excess of \$10,000 must require compliance with Executive Order 11246, "Equal Employment Opportunity," as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and as supplemented by regulations at 41 CFR Part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

You can find information on Equal Employment Opportunity at the Department of Labor web-site: <http://library.dol.gov/dol/compliance/comp-eeo.htm>

4. **Copeland "Anti-Kickback" Act** (18 U.S.C. 874 and 40 U.S.C. 276c) – Construction contracts must require compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act prohibits contractors from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled.

You can find information on the Copeland "Anti-Kickback" Act at the Department of Labor web-site: <http://www.dol.gov/dol/compliance/comp-copeland.htm>

5. **Davis-Bacon Act, as amended** (40 U.S.C. 276a to a-7) – Some EPA statutes authorizing grants require that construction contracts which exceed \$2,000 to comply with the Davis-Bacon Act (40 U.S.C. 276a to a-7), as supplemented by Department of Labor regulations (29 CFR part 5, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction"). Under this Act, contractors must pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must pay wages not less than once a week.

You can find information about the Davis-Bacon Act, including prevailing wage rates, on the Department of Labor web-site: <http://www.dol.gov/dol/compliance/comp-dbra.htm>

6. **Contract Work Hours and Safety Standards Act** (40 U.S.C. 327-333) – (a) Construction contracts which exceed \$2,000 or other contracts that involve the employment of mechanics or laborers which exceed \$2,500 must require compliance with sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333), as supplemented by Department of Labor regulations (29 CFR part 5). Section 102 of the Act requires that the wages of every mechanic and laborer be computed on the basis of a standard 40 hour work week. A mechanic or laborer must be paid at a rate of not less than one and ½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week.

(b) Construction contracts which exceed \$100,000 must provide that no laborer or mechanic may be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. (This requirement does not apply to the purchase of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.)

You can find information on the Contract Work Hours and Safety Standards Act on the Department of Labor web-site: <http://library.dol.gov/dol/compliance/comp-cwhssa.htm>

**7. Rights to Inventions, copyrights, and rights in data** – Your contracts must contain a notice of EPA’s requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed by the contractor, and to copyrights and rights in data. Your contract must reference the license, described in 40 CFR 31.34, EPA reserves in any work you or your contractor develop or acquire with EPA financial assistance.

**8. Records** – Your contracts must allow you, EPA, the Comptroller General of the United States, or any of their duly authorized representatives, access to any books, documents, papers and records of the contractor directly pertinent to your contract for the purpose of making audits, examinations, excerpts and transcriptions (40 CFR 31.42(e)). In addition, your contracts must require the contractor to retain all contract-related records for three years after the contractor receives final payment. Some EPA program regulations (*e.g.*, 40 CFR Part 35, Subpart O) prescribe longer record retention periods which apply to you and to your contractors.

**9. Debarment and Suspension** – Contracts must prohibit contractors from awarding any subcontract expected to equal or exceed \$25,000 to persons (individuals or organizations) listed on the Excluded Parties List System (EPLS) which is available at: <http://www.epls.gov/>. The list contains the names of persons debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than Executive Order 12549.

**10. Energy and Environmental Conservation.** – Contracts must require contractors to comply with standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163, 89 Stat. 871).

**11. Byrd Anti-Lobbying Amendment** (31 U.S.C. 1352) – Contractors who apply or bid for an contract of more than \$100,000 must file a certification that it will not and has not used Federally appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, officer or employee of Congress, or an employee of a Member of Congress in connection with obtaining your grant. The contract must also require that any subcontractor who applies or bids for subcontract in excess of \$100,000 must provide a similar certification to the next higher tier contractor or subcontractor. Contractor and subcontractors must also disclose any lobbying with non-Federal funds in connection with obtaining the grant. Each contractor or subcontractor must forward any disclosures from tier to tier up to the recipient.

## APPENDIX C

### CONSTRUCTION CONTRACT BONDS



You must ensure EPA's interest in construction or facility improvement contracts under grants is adequately protected. You must at least meet the following minimum standards (40 CFR 31.36(h)).

1. For construction or facility improvements contracts which are \$100,000 or less, unless your grant indicates otherwise, you may follow your own requirements relating to bid guarantees, performance bonds, and payment bonds. The grant will include a term and condition advising you of any additional EPA requirements if required by statute.

2. For construction or facility improvements contracts which exceed \$100,000, unless EPA authorizes different limits or requirements, you must require:

- S Bidders to provide a bid guarantee equivalent to five percent of the bid price. The bid guarantee may be a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid to ensure the bidder will accept

award of a contract if you accept the bidder's bid.

- S Successful bidders to provide a performance bond for 100 percent of the contract price to ensure fulfillment of the contractor's obligations under the contract.
- S Successful bidders to provide a payment bond for 100 percent of the contract price. A payment bond ensures payment as required by law to all persons supplying labor and material under the contract.